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SUPREME COURT OF THE UNITED STATES.

No. 161. OCTOBER TERM, 1920.

HARTFORD LIFE INSURANCE COMPANY,
Plaintiff in Error,
v.
CECILIA BLINCOE, Administratrix of the Estate of ROSA BARBER, Deceased,
Defendant in Error.

In Error to the Supreme Court of the State of Missouri.

REPLY BRIEF OF PLAINTIFF IN ERROR AND PETITIONER.

JAMES C. JONES,
F. W. LEHMANN,
GEO. F. HAID,
Counsel for Plaintiff in Error and Petitioner.

ST. LOUIS LAW PRINTING CO., 415 N. Eighth St. Bell, Main 1819.

IN THE

SUPREME COURT OF THE UNITED STATES.

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Taxes Paid State of Missouri.

Defendant in error states, at page 8 of brief, that the company failed to prove that the Superintendent of Insurance of Missouri ever levied or assessed a tax

on the assessments collected by the defendant in Missouri. What does the record show? Under date of March 29, 1910 (Rec., p. 363), the Superintendent of Insurance of Missouri wrote to the company, stating:

> "I hereby notify you that the amount of taxes due the State of Missouri from your company on premiums collected therein, in the year 1909, is two per cent on $171,504.39 (as shown by schedule) $3,430.09, which you will please remit to Hon. James Cowgill, State Treasurer, Jefferson City, Mo., on or before May 1st, 1910, and he will receipt you therefor."

The record shows (page 366) that the amount thus assessed upon was made up of the following items:

Safety Fund, Men's	$112,527.91
Safety Fund, Women's	7,418.80
Stipulated Premium	46.76
Stock Department	51,510.92
Total	$171,504.39

And the receipt of the Treasurer of the State (Rec., p. 370) shows the amount received is "in full for taxes due the State (on premiums collected in Missouri during the year ending December 31, 1909) **the same being assessed** against said company **by the Superintendent of the Insurance Department of the State,**" etc.

And the same procedure was followed with reference to the collections of the company made in Missouri during the year 1910 (Rec., pp. 371, 372).

And on cross-examination of the witness Collins W. Benton (Rec., p. 379) it was shown that a tax of two per cent was levied against the assessments collected upon the certificate in suit, from March 1, 1894, to December 1, 1909, and the tax so collected was paid to the State levying the same (Rec., p. 288, and bottom of p. 141, and pp. 261 and 291).

And Mr. M. D. Aber, one of the attorneys for the plaintiff at the trial, and who formerly had been Deputy Superintendent of the Insurance Department, was asked this question (Rec. p. 354):

> "Q. Mr. Aber, do you know what the departmental practice or the ruling of the Insurance Department of the State of Missouri was during that period, with reference to the application of the statutes of the State which require a tax of two per cent of all premiums collected by an insurance company licensed to do business in this State, with reference to **assessments**?"

With a great deal of reluctance, the witness finally answered (Rec., p. 357):

> "There was a two per cent tax levy, I think, pursuant to section 8706; I am not sure of the number of the section."

Dues.

Defendant in error states, at pages 8 and 9 of brief, that no dues were payable by assured until October, 1910.

The provision of the certificate is (Rec., p. 432) that:

> "The member agrees to pay to said company, for expenses, dues of three dollars per annum on each $1,000 indemnity, on the first day of the month after date of issue hereof, and at every anniversary thereafter, so long as this certificate shall remain in force; **or** by **pro rata** installments of the same, **in advance**, for periods of less than a year."

The record shows (Rec., p. 171) that from the inception of the certificate in suit in 1893 the insured paid his dues quarterly. The record also shows that the last dues he paid were paid December 6, 1909, for the quarter commencing December 1, 1909. Consequently, the assured paid his dues in advance only to the end of the quarter, which began December 1, 1909, and, therefore, another quarterly payment, in advance, became due March 1, 1910, the beginning of the quarter following the previous payment.

Dividends.

Defendant in error states (page 9 of brief) that the dividend to which assured was entitled was not taken into consideration in making the assessment.

The notice of assessment itself shows that the insured was entitled to a credit of $1.40 (Rec., p. 144), leaving a net amount to be paid of $13.19. The certificate provided that a semiannual division of the net interest received from the trustee of the Safety Fund (the Security Company) should be made *pro rata* among the holders of **certificates in force** "by applying the same **to the payment of their future dues and assessments**". Nowhere is there any provision that the net earnings of the Safety Fund shall first be deducted from the gross amount of the assessment against the entire membership, and then a division of the assessment shall be made among the members as the plaintiff contends ought to have been done; first, because the certificate contemplates it shall be credited on the **future** "dues **and** assessments" and not specifically in reduction of either the **dues** or the **assessments**; second, as the record shows, the assessment here involved was made and levied in the same manner as all previous calls (Rec., p. 344), and it is not shown that the insured ever objected to any of the calls, so there was a practical construction of this provision of the certificate covering a period of many years preceding the assessment in question.

Robinson v. United States, 13 Wall. 363;
Central Trust Co. v. Wabash, 34 Fed. 256;
Cook v. Foley, 152 Fed. 50.

Source of Dividend.

Although counsel for defendant in error (who have been in this case from its inception) must have known the facts, as shown by the provisions of the certificate in suit, as well as by the record (pp. 183, 210, 252), that the dividend to be applied in reduction of the dues and assessment was the insured's *pro rata* share of the earnings of the Safety Fund in the hands of the Security Company, yet they quote from the opinion of the Supreme Court of Missouri an erroneous and wholly unsupported and unjustified statement to the effect that his *pro rata* dividend of $1.40 arose from a fund found by the Dresser decree "to have been illegally withheld from the policyholders on account of excessive fees exacted for the care of the safety fund", which fund counsel also well know is not in the hands of the defendant.

Allegation as to Termination of Certificate.

At page 30 of their brief, counsel for defendant in error state that defendant "knew and now alleges in its answer and admits and contends that under the terms of the policy it was in force June 1, 1910". In the face of the allegations of the answer, such a statement is incomprehensible. At pages 9 and 10 of the record the defendant pleads the levy of the assessment involved and the steps taken to notify insured of the

assessment and dues payable by him March 1, 1910, and pleads that "by the terms and provisions of said policy and application the failure of said Frank Barber to pay said assessment, as well as his failure to pay said dues, terminated said certificate or policy".

And again, at page 12, the answer alleges:

> "Defendant alleges that although the said Frank Barber lived until the 5th day of June, 1910, or for nearly four months after the forfeiture of the policy, by reason of the non-payment of the assessment and dues in **March, 1910**, he at no time considered said certificate in force, but at all times acquiesced in the forfeiture thereof resulting from the non-payment of said mortality call or assessment, and abandoned all claims, rights or demands under said certificate or policy."

Tax on Assessments.

Defendant in error contends (at pages 4, 32 of Brief) that prior to the levy of the assessment in question, certain decisions of the State of Missouri had consistently held that the statute of Missouri providing for the collection of a tax of two per cent upon premiums of foreign insurance companies collected in the State, was not applicable to collections of assessments made by foreign companies doing business in Missouri without having qualified under the Assessment Statute of Missouri. What do those cases hold?

Northwestern Masonic Aid Ass'n v. Waddill, 138 Mo. 628, 638, was an action brought by a company doing business on the assessment plan, and licensed as such in the State of Missouri, as is shown in the opening paragraph of the opinion. It states:

> "This is an action by injunction instituted in the Circuit Court of the City of St. Louis, to restrain the defendant, superintendent of the Insurance Department of the State of Missouri, from assessing or levying a tax of two per cent upon premiums received by plaintiff, a corporation under the laws of the State of Illinois, doing business in the State of Missouri on the assessment plan, **and from canceling its license to do business**, because of its failure to pay such tax."

And at page 636 the Court distinctly holds that:

> "The plaintiff and the companies named in the petition are insurance companies on the assessment plan **as defined in this article**, and **under it**, doing business in this State."

It is evident, therefore, that the decision above referred to did not involve, and did not decide, the effect of the tax statute with reference to foreign companies doing an assessment business, **who had not qualified under the Missouri statute concerning insurance companies on the assessment plan.**

The case of Westerman v. Supreme Lodge Knights

of Pythias, 186 Mo. 670, involved the question as to whether the non-forfeiture statute of Missouri applied to a fraternal beneficiary association and the tax question was not involved, and besides, as shown by the Court at page 700, the defendant was licensed by Missouri to do business in that State as a fraternal society.

And in the case of Bankers' Life Co. v. Thorn, 186 S. W. 681, the opinion of the Missouri Supreme Court shows in its opening sentence that the company "was duly licensed to do business by the Insurance Department of Missouri during the whole period of its incorporation, and conducted an assessment insurance business here until the change in its charter" in 1911 from an assessment company to that of a legal reserve or level-premium company. So that even as to this kind of a company and notwithstanding the Waddill case, the Superintendent of Insurance had been and was exacting the two per cent tax on assessments it collected in Missouri. And, as will be observed, the nisi prius court decided in favor of the position of the Superintendent of Insurance, an appeal was prosecuted to the Supreme Court, the case was transferred to the Court en banc, and the latter reversed the trial court by a vote of 4 to 2, the seventh judge not sitting.

As we have already pointed out, neither of the three cases referred to had reference to a company not licensed to do business on the assessment plan in Missouri.

Considering that the Hartford Life Insurance Company was a foreign corporation doing business in Missouri upon the assessment plan, licensed to do life insurance business generally (i. e., under the general insurance laws of the State), but not licensed under the special act concerning assessment companies, for the very good reason that its form of organization and contract precluded it from obtaining such a license, how can it reasonably be charged with having wrongfully included this tax merely because it complied with the demands of the State, especially when the Supreme Court of the State had ruled (Schmidt v. Foresters, 228 Mo., l. c. 700) that companies which had not qualified under the assessment statute were subject to the **general insurance laws** of the State, and all of the adjudicated cases on the tax statute involved companies which had qualified under the assessment law.

And although counsel for defendant in error would have the company charged with negligence in its duties as a trustee because it was complying with a demand made upon it by a sovereign state under a statute which seemed to justify the demand, and notwithstanding the fact that from the time the testi-

mony was taken in this case in 1912, it has constantly appeared that a 15-cent tax was included in the assessment, yet the same counsel themselves during a period of five years from the filing of the complaint in this case in 1911 until they filed their brief on the former writ of error in this court, did not regard the inclusion of such tax as fatal to the assessment.

In fact there was no decision in Missouri holding that the tax was not applicable to the assessments of the defendant until the decision of the case of Young v. Hartford Life Insurance Co., 277 Mo. 694 (which case is still pending final determination in the state court), and which decision we firmly believe ought not to be sustained because it is an attempted evasion of the effect of the Dresser decree, as has been pointed out in the original brief for plaintiff in error in this case (pages 42 et seq.).

Besides this, the assessment involved in the Young case was levied in 1914, after the filing of the suit in the Chorn case, although prior to the decision in that case.

As to the Effect of the Former Adjudication of the Tax Question by this Court.

We have no doubt that it is the rule, as indicated by the cases cited by defendant in error (at page 17 et seq. of brief), that when a case before an Appellate Court contains several grounds justifying a reversal of the judgment, the Appellate Court need not dispose of each of the contentions, but may confine its consideration to any one of them and leave the others open and undecided.

It is quite different, however, where the case to be reviewed is correctly decided, but the reason given in support of the decision is erroneous. In such case if the judgment is right, the reviewing Court will uphold it, notwithstanding a wrong reason for such judgment was given by the Court which entered the judgment. If the reviewing Court does not sustain the judgment, there can be but one conclusion, i. e., that the reason assigned for sustaining it is not valid, and before this result could have been reached, it must necessarily have considered and decided that question.

That is exactly what occurred here. When this case was here on the first writ of error, it was contended by the defendant in error that, although this Court should conclude that the decision of the Supreme Court of Missouri was placed upon the wrong ground,

yet, since the record showed the inclusion of the tax and since such inclusion rendered the assessment illegal, that fact necessitated an affirmance of the judgment under review. Undoubtedly, if the inclusion of that tax vitiated the assessment, the conclusion stated was correct.

This Court did not accept the view thus insisted upon by the defendant in error, and, therefore, must necessarily have concluded that the inclusion of the tax did not vitiate the assessment, otherwise it would of necessity have affirmed the decision.

True, this Court did not discuss this question or give any reason for ignoring it, nor was it necessary for it to do so, because it is not incumbent upon an Appellate Court to specifically pass upon every point raised by counsel. It is prefectly obvious that in a case such as this, where the issues are so restricted that the point made, if sound, must necessarily necessitate an affirmance of the judgment appealed from, that if the Court decides the case contrary to a view so presented by counsel, it must be because it found his view untenable, otherwise it would not have so decided the case.

Nor was it essential that this Court state why it found that view untenable, whether it was.

(1) Because it could not be said that in 1910 the assessments collected by defendant in Missouri were not taxable, or

(2) Because the amount of the tax (fifteen cents) was so small that the Court would not permit its inclusion to excuse the insured from paying all future assessments and thereby mulct his co-members who were in the same position as he was, and who would not have profited by the collection of the tax from insured, or

(3) Because under the decision in the Dresser case it was held that an excess in an assessment, if any, should not vitiate or invalidate an assessment, but should simply render the succeeding assessment subject to credit for such excess.

Assessments in Course of Collection.

Defendant in error, on page 31 of brief, states erroneously that the defendant had extended the time of payment of $185,000 of assessments. There is no foundation for this statement. The fact is, the State requires the reports of life insurance companies to exhibit their assets and liabilities. Every death loss is a liability and must be shown as such. The old-line companies have their invested assets, i. e., reserves, while assessment companies have only their power of assessment. As to assessment companies, therefore, against their losses, as soon as they are incurred, there is, as a corresponding asset, i. e., the assessment to be made on account of such losses, and the one balances the other. This is explained by Mr.

Lawrence on page 300 of the record, where he says that death claims "were charged as a liability in our statements to the department, but a corresponding amount for those other death claims was put in the assets under the head, 'Premiums in course of collection, Safety Fund Department' ". This is both proper and necessary as a matter of accounting, for otherwise an assessment company would always appear without assets to offset its liabilities.

Respectfully submitted,

JAMES C. JONES,
F. W. LEHMANN,
GEO. F. HAID,

Attorneys for Plaintiff in Error.

DEFENDANT'S

BRIEF

DEC 14 1920
JAMES D. MAHER,
CLERK

IN THE

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BRIEF OF DEFENDANT IN ERROR.

CHARLES E. MORROW,
Attorney for Defendant in Error.

St. Louis Law Printing Co., 415 N. Eighth St. Bell, Main 1819.

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STATEMENT OF THE CASE.

This case was in this Court before and is reported in 245 U. S. 146. This Court reversed the judgment of the Supreme Court of Missouri on the ground, as stated in its opinion, that the decision of the Supreme

Court of Missouri failed to give full faith and credit to a certain Connecticut decree in a case known and called "The Dresser Case". The cause was reversed and remanded by this Court to the Supreme Court of Missouri to be proceeded with not inconsistent with its opinion. In obedience to this mandate, the Supreme Court of Missouri reversed and remanded the cause generally for a new trial and sent it down to circuit to be tried anew. After the cause was remanded for a new trial the defendant amended its answer, pleading a new and additional defense. To this answer plaintiff filed a reply which pleaded certain new affirmative matters in reply, namely, that the assessment in question was excessive and void because it contained the sum of 2 per cent thereof for taxes which were not required by the State of Missouri, and that defendant had wrongfully collected from assured the sum of 2 per cent on each and every assessment on said policy from the date thereof to the time of his death, amounting to more than the amount of the alleged assessment, for which sum defendant was indebted to the assured at the time of the alleged assessment, and that by reason thereof defendant could not forfeit the policy for failure to pay the same (Rec., p. 25). The issues were reframed in the trial court by both plaintiff and defendant under the provisions of the Missouri code.

At the second trial the Connecticut record was admitted in evidence and full faith and credit was given to the Dresser decree and the mandate of this Court was followed as to all matters decided by it. The decision of the case turned at the trial on purely a state question of general law and resulted in a verdict and judgment for the plaintiff for the full amount of the policy sued upon and interest with damages and attorneys' fees for vexatious refusal to pay, as authorized by the Missouri statute.

The defendant appealed the cause to the Supreme Court of Missouri, which affirmed the judgment. The decision of the Supreme Court of Missouri is not in conflict with the prior decision of this Court, as shown on its face. But the Supreme Court of Missouri, in its second decision, followed the opinion of this Court on all questions decided by it when the case was here before. The Supreme Court of Missouri bases its decision wholly upon a question of general law, namely, that because the assessment, for the failure to pay which the policy was canceled by the defendant prior to the death of the assured, was excessive and illegal and void because it included an alleged 2 per cent tax upon the amount thereof attempted to be collected by the defendant from the assured, in advance, in order that defendant might pay it to the State of Missouri, and because the defendant had illegally exacted of assured this 2 per cent tax on all

prior assessments, which amounted to $11.93, a sum sufficient to pay the assessment less the dividend due him, and was indebted in that amount to assured at the time of the assessment and at the time it attempted to cancel the policy and that this indebtedness should have been applied to its payment.

The Supreme Court of Missouri held that the State of Missouri had no right to exact such a tax under the Missouri statute, a question which had been decided by that Court as early as April 3, 1897, in the case of Northwestern Masonic Aid Association v. Waddill, 138 Mo. 628, which was offered in evidence by the plaintiff in error in this case, and from which it appears that the learned counsel now representing the plaintiff in error in this Court, represented the prevailing party in that case and were instrumental in getting such a construction placed upon the Missouri statute. That case has been consistently followed since by that Court in three decisions: Westerman v. Supreme Lodge, 196 Mo. 67, decided June 1, 1906; Bankers Life Co. v. Chorn, 186 S. W. 681, decided June 2, 1916, and Young v. Hartford Life Insurance Co., 277 Mo. 694, decided April 7, 1919.

While there was some evidence in the former record of this case tending to show that this illegal tax had been included in the assessment in question, it was not raised as an issue in either the trial court or in the Supreme Court of Missouri when this case was

first before it; the plaintiff did not plead it and it was not considered or decided either by the trial court or the Supreme Court of Missouri.

When the case was here before defendant in error did make the point in its brief that the assessment in question did include such a tax which was not required by the laws of the State of Missouri and stated: "The Supreme Court of Missouri has not put its decision upon that ground, but defendant in error under the authorities may now assign in this Court another ground not considered by the Supreme Court of Missouri, and if it is found by this Court to be sound law and the judgment of the Supreme Court of Missouri is right, it will not be reversed on writ of error."

In support of this contention, two Missouri cases holding the tax illegal were cited. But this Court refused to consider or notice this assignment or to decide it when the case was here before. After this cause was remanded by this Court to the Supreme Court of Missouri and by the Supreme Court of Missouri to the Circuit Court for a new trial and after the defendant had amended its pleading, pleading new and additional defenses, the plaintiff in her reply, as she had a right to do under the Missouri practice, pleaded specifically that the assessment in question included this illegal tax and that the defendant had wrongfully exacted a 2 per cent tax on all prior as-

sessments and was indebted to the assured at the time of the assessment in question in amount sufficient to pay the same and for that reason that the assessment was illegal and void. The defendant took depositions in an effort to meet this new issue and attempted to show that such a tax had been exacted by the State of Missouri of defendant and took the depositions of Collins W. Benton in Hartford, Connecticut, and offered in evidence the receipt of the Treasurer of the State of Missouri to the Hartford Life Insurance Company for $3,430.09 for taxes for the year ending December 31, 1909 (Rec., p. 370). This new evidence also tended to show that the 2 per cent tax on the assessment in question was covered by and included in that payment to the State of Missouri and that this 2 per cent tax was collected in advance of payments to the State of Missouri on the theory that it would thereafter exact this tax from the Company and that in this particular instance the tax was attempted to be collected in advance from assured. That is, that the tax collected during the year would not be actually paid out by the company until the end of the year (Rec., p. 381).

This new and additional evidence further showed that the defendant had collected from assured 2 per cent on all prior assessments on the policy in suit in advance since March 1, 1894 (Rec., pp. 379-381).

These assessments amounted in all to $596.51, 2 per cent on which amounts to $11.93.

The plaintiff's evidence in chief at the second trial was about the same as before. She offered in evidence the policy sued on, together with a letter from defendant dated July 8, 1910, in which the defendant denied liability on the policy "for non-payment of call due March 1, 1910" (Rec., p. 52).

She then offered in evidence the reasonable value of attorney's fees and closed her case.

The defendant, to carry the burden placed upon it by the law of the State of Missouri to show a forfeiture for failure to pay an assessment and that such assessment was legally made and not excessive and that notice was given assured as provided in the policy and that he failed to pay the assessment, offered all the evidence offered by it at the former trial, and also the new evidence above referred to.

It also offered a resolution of its board of directors giving to its executive officers discretionary general power to transact on behalf of the company all lawful business of every kind. This was not in evidence before (Rec., p. 348). Also a letter from its secretary to one of the men in the office setting out Call No. 126 giving the number of deaths and the amount of call and the ratios (Rec., p. 345).

While the notice of assessment did not show upon

its face, defendant's evidence showed that assessment 126 which it claims was made against assured was excessive and void and a copy of the notice sent to him by it is as follows:

"For mortality call.....$13.09
For quarterly dues to June next..... 1.50

$14.95

Credit $.....
Dividend to be applied if payment be made 1.40

$15.19
(Rec., p. 144)."

Defendant's evidence further showed that it included a 2 per cent tax on the amount thereof (Rec., p. 146).

The defendant's amended answer, upon which the case was tried the second time, also showed that this tax was included in this assessment (Rec., p. 9). The defendant absolutely failed to prove that the Superintendent of Insurance ever levied or assessed any tax whatever on these assessments. Defendant's evidence also showed conclusively that it had received as interest on funds, to which assured had contributed, which defendant had set apart to assured as a dividend, the sum of $1.40, which under the provisions of the policy should be applied to the payment of dues. Under the provisions of the policy no dues were pay-

able by assured until October, 1910, unless the assured wished to pay them "by pro rata installments, in advance for periods of less than a year" (Rec., p. 423). Under the terms of the policy, a holder who had contributed five years prior to the date of a semiannual dividend, such dividend should be applied to his future dues and assessments (Rec., p. 422). The defendant's evidence conclusively showed that assured had contributed to the fund five years prior to the semiannual dividend in question and that the dividend had been declared by the defendant to the assured (Rec., p. 183).

From the foregoing, it appears conclusively that under the terms of the policy the assured owed no dues at the time of the alleged forfeiture; that the dividend of $1.40 should have been applied in the reduction of the assessment; that this was not done by the defendant and this dividend was not taken into consideration in making the alleged assessment, but the assessment was figured at the ratio of $4.20 per thousand without crediting the dividend to assured in the reduction thereof. In the notice of assessment, however, the dividend was placed at the bottom thereof with the statement "dividend to be applied if payment be made, $1.40" (Rec., p. 144).

The defendant also offered in evidence a copy of its record, which shows that the policy in question was canceled by it March 31, 1910 (Rec., p. 156).

The policy provides that if a tax is required by the State, "then the mortality call hereon shall be determined so as to cover such tax" (Rec., p. 424).

The Missouri statutes, section 7099, relied upon by the defendant, only provides that "**premiums**" may be assessed by the Superintendent of Insurance, as before stated. The Supreme Court of Missouri held, as early as April 3, 1897, in the case of Northwestern Masonic Aid Association v. Waddill, 138 Mo. 628, offered in evidence by plaintiff in error, that this statute did not include assessments such as the one in question and that under it they were not taxable.

From the foregoing, it conclusively appears that the assessment in question was not calculated, computed or levied in accordance with the terms of the policy. It was for a larger sum than that provided for in the policy if computed by the age of assured and the graduated mortality ratio table on the back of the policy which is a part of it. It included a 2 per cent tax on the amount thereof which was not required by the laws of the State of Missouri. It included quarterly dues in the sum of $1.50 which were not due and payable. It only permitted assured to take advantage of his dividend of $1.40 which had been set apart for him and belonged to him if he paid the whole assessment and dues which constituted a single demand upon him to pay the full amount. The company was indebted to him at the time for sums illegally exacted

from him in an amount more than sufficient to pay the real assessment, less his dividend.

Defendant's charter was offered in evidence and showed that it was a foreign insurance corporation, and the defendant offered in evidence certificates of authority granted to it to do business in the State of Missouri covering the years 1909-1910 (Rec., pp. 387-389). The evidence showed that during the period from the issuance of the policy to the death of the assured it was engaged in the business of soliciting and writing life insurance for profit and issued policies in different forms providing for different kinds or classes of insurance. Its contention here that it had never accepted the statute of Missouri and was not under its provisions and was doing this assessment business without a license is disposed of by the opinion in this case and is purely a question of general state law, the decision of which ought to be left to the courts in Missouri.

POINTS AND AUTHORITIES.

I.

Only the questions decided by this Court when this case was here before became the law of the case. That decision cannot be extended to matters not decided.

In re Potts, 166 U. S. 263;
Mutual Life Insurance Co. v. Hill, 193 U. S. 551;
Ex parte Union Steamboat Co., 178 U. S. 317;
In re Sanford Fork Tool Co., 160 U. S. 247;
Barney v. Winona, Etc., R. R. Co., 117 U. S. 228;
Tanizer v. Railroad, 191 Fed. 543, l. c. 547;
Gwin v. Waggoner, 116 Mo. 143, l. c. 151;
Howell v. Sherwood, 242 Mo. 513;
Wilcox v. Phillips, 260 Mo. 664.

By reversing this cause on one ground this Court did not consider and decide all the questions presented or which might arise at a further trial thereof.

Mutual Life Insurance Co. v. Hill, 193 U. S. 551.

II.

The Connecticut decree in the Dresser case only decided that the company had the right to retain

and have on hand for the purpose of paying future death losses a sum equal to one assessment.

Hartford Life Insurance Co. v. Ibs, 237 U. S. 662;

Hartford Life Insurance Co. v. Barber, 245 U. S. 146.

III.

The dues for which the company attempted to cancel the policy in March, 1910, were not due and payable until October, 1910.

Barber v. Hartford Life Insurance Co., 269 Mo., l. c. 40-41.

IV.

Section 7068 of the Revised Statutes of Missouri, 1909, as amended, providing for damages and attorney's fees, for vexatious refusal to pay a policy of life insurance is constitutional, and the decision of the Supreme Court of Missouri does not deprive the defendant of its property without due process of law.

Farmer, Etc., Ins. Co. v. Dobney, 189 U. S. 301;

Fraternal Mystic Circle v. Snyder, 227 U. S. 497;

Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123;

Fidelity Mutual Life Assn. v. Mettler, 185 U. S. 308;

Iowa Life Ins. Co. v. Lewis, 187 U. S. 335;
Williams v. Liverpool, Etc., Ins. Co., 141 Fed. 54;
Barber v. Hartford Life Ins. Co., 269 Mo. 21;
Keller v. Home Life Ins. Co., 198 Mo. 440.

V.

Questions of fact are not reviewable by this Court on a writ of error to a state court.

Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92;
Keokuk, Etc., Bridge Co. v. Illinois, 175 U. S. 626;
Atchison, Etc., R. Co. v. Matthews, 174 U. S. 96;
Chicago, Etc., R. Co. v. Chicago, 166 U. S. 226;
Egan v. Hart, 165 U. S. 188;
Dower v. Richards, 151 U. S. 658.

ARGUMENT.

This Court reversed the judgment of the Supreme Court of Missouri in this cause for the sole reason that full faith and credit was not given to the Connecticut record. In its opinion it states: "We are of the opinion that full faith and credit was not given to the Connecticut record and that for that reason the present judgment must be reversed" This Court further held that this error inhered in an instruction given by the trial court to the jury and for that reason this cause had to go back to be retried. This Court clearly recognized that there were issues of fact left open in the case and in its mandate the judgment was reversed and the cause was remanded to the Supreme Court of Missouri to be proceeded with not inconsistent with the opinion of this Court. It did not hold that the assessment in question was legal and valid. While it stated in the opinion: "It is obvious on the evidence that this assessment was levied in the usual way, adopted by the company and tacitly sanctioned by the Connecticut judgment", this had reference solely to the question of the company being permitted to have the amount of one assessment, $300,000, on hand to pay future death claims, and for that reason the assessment was not excessive. It was further stated

by this Court in its opinion that a jury would have been justified at least in finding that the assessment was made by the directors within the meaning of the charter, although it did not appear that the directors went over the figures of the officers who made it up and voted it specifically. These observations, of course, were made as the evidence stood in the former record. This matter was submitted to the jury at the former trial as a question of fact, and of course, this Court could not and did not, as stated in its opinion, reverse the case on that ground. But at the second trial the defendant proved clearly that the assessment in question was not made by the board of directors at all, but that they had delegated this power to two of the company's executive officers.

The defendant clearly recognized this and at the second trial amended its answer and raised new issues and took depositions and offered new and additional evidence. Plaintiff also amended her pleadings and raised a new issue and it was upon this new issue that the decisions of the Supreme Court of Missouri is based.

The rule adopted by this Court where a cause has been reversed and remanded without specific direction to enter any particular judgment is the same as the rule adopted by the Supreme Court of Missouri, namely, that the trial court may consider and decide any matters left open by the mandate

of the Appellate Court (In re Potts, 166 U. S. 263). The Supreme Court of Missouri has also adopted the same rule adopted by this Court, that where a cause has been reversed and remanded and returned to the trial court for further proceeding, the trial court may permit the pleading to be amended and new and additional evidence heard, and decide all questions left open and that the rule is that a judgment of reversal is not necessarily an adjudication by the Appellate Court of any other than the questions in terms discussed and decided.

In Mutual Life Insurance Company v. Hill, 193 U. S. 551, a case where the decision was based upon the averments of the pleadings and these pleadings were amended after judgmnt was reversed and the case remanded to the trial court, it was said:

> "Clearly the contention of the plaintiff is not sustainable. Where a cause is presented to an Appellate Court it is not obliged to consider and decide all questions then suggested or which may be supposed to likely arise in the further progress of the litigation. If it finds in one respect an error has been committed, so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. * * * It is impossible to foretell what shape the second trial may take or what questions may then be presented. **Hence the rule is that a judgment of reversal is not necessarily an adjudication by the**

Appellate Court of any other than the questions in terms discussed and decided."

To the same effect are the cases of Tanizer v. The Railroad, 191 Fed. 543, l. c. 547; Patillo v. Allen-West Commission Co., 108 Fed. 723.

In the last case above mentioned, Judge Thayer said:

> "While the rule that an adjudication by an appellate tribunal becomes the law of the case, on all subsequent trial, is a wholesome one which should be enforced, yet it should be confined to questions that were considered and decided and not extended to dicta or intimations contained in an opinion which may be thought to foreshadow the views of the Court on other questions."

In Ex parte Union Steamboat Company, 178 U. S. 317, it is said:

> "The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this Court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court."

To the same effect is the case of Re Sanford Fork Tool Co., 160 U. S. 247. In that case it is said that the trial court, after remand, might allow amendment of the pleadings and try and decide all questions left open by the decision of the Appellate Court.

In Barney v. Winon, Etc., Railroad Co., 117 U. S.

228, it was held that the rule that what was decided on first appeal is not open to reconsideration in the same case, on the second appeal, does not apply to expressions of opinion on matter, the disposition of which was not necessary to a decision.

In Hodges v. Easton, 106 U. S. 408, where it was asked that the Court upon a reversal of a case which had been tried by a jury, that the issues on a retrial be restricted to the issues of the first trial, the Supreme Court of the United States refused to so do, for the reason that when a cause tried by a jury was not submitted to it as required by law, the Appellate Court had no authority to so restrict the issues on a second trial. Judge Harlan said:

> **"There is then no alternative but to reverse the judgment with directions that a new trial be had upon all the material issues of fact."**

This was the exact situation here. This Court had held that this cause had been submitted improperly to a jury in the instructions of the trial court, and reversed the judgment of the Supreme Court of Missouri and remanded the cause to that court to be proceeded with not inconsistent with its opinion. In obedience to this mandate, the Supreme Court of Missouri reversed the judgment of the trial court and remanded this cause to that court generally for new trial, without specific directions. Clearly the trial

court had a right to decide all questions arising in the case, which had not been specifically decided by this Court, and that by deciding some of the questions in said cause, this Court did not decide any other questions. This is also the rule in Missouri (Gwinn v. Waggoner, 116 Mo., l. c. 551; Howell v. Sherwood, 242 Mo. 513).

Finally, the only question which can arise in this case, as to the judgment and proceedings of the trial court, and the decision of the Supreme Court of Missouri, is whether or not its judgment is inconsistent with the opinion of the Supreme Court of the United States.

In Steinfeld v. Zeckendorf, 239 U. S. 24, it is held that where the Supreme Court reverses a judgment and remands the cause, "for such further proceedings as may not be inconsistent with the opinion of this Court," the only question is whether or not the judgment rendered below is inconsistent with such opinion and when it is not, there is no reason for disturbing it.

Therefore, even if all the questions now presented were in the former record and were presented to this Court, which we deny, clearly it did not decide them and its decision cannot be extended to matters not decided by it. By deciding this cause and reversing it upon one ground, this Court did not and cannot be

held to have considered and decided all the questions presented or which might further arise at a new trial. Only such questions as were passed upon by this Court became the law of the case (In re Potts, 166 U. S. 263; Mutual Life Ins. Co. v. Hill, 193 U. S. 551; ex parte Union Steamboat Co., 178 U. S. 317; Gwinn v. Waggoner, 116 Mo., l. c. 151; Howell v. Sherwood, 242 Mo. 513). And all the questions arising at the second trial and presented to the trial court and to the Supreme Court of Missouri were not passed upon and decided by this Court and as to some of the issues at the former trial the evidence was entirely different at the second trial. The decision of this Court is not res adjudicata as to questions it did not decide. The cases cited by plaintiff in error on this question do not sustain it.

In the case of United States Trust Company v. New Mexico, 183 U. S. 535, New Mexico filed an intervening petition claiming a lien for certain taxes. The trial court dismissed the petition because "the matters and things therein set up were not sufficient to entitle said intervening petitioner to the relief sought by its petition." On appeal, the Supreme Court of New Mexico affirmed the action of the trial court. The Supreme Court of the United States reversed the decision of the Supreme Court of New Mexico and remanded the cause for further proceedings. The

Court, after remand, found that New Mexico was entitled only to a lien on a portion of the railroad, instead of upon all of it. The Supreme Court of New Mexico modified the decree and reduced the amount found to be due. On the second appeal the Supreme Court of the United States held that in its prior decision it had adjudicated that the petition presented a valid claim, "and is conclusive of such prima facie validity, not merely against objections which were in fact made, but also against those which might have been made". Mr. Justice Brewer in deciding the case said: "We start in this inquiry then with the adjudicated fact that upon the face of the intervening petition was presented a valid claim for the taxes therein specified." The case went upon a certified statement of facts and the Court held this statement of facts insufficient as far as the railroad company was concerned. As to New Mexico, the Supreme Court took up and disposed of a number of questions raised by it which had not been presented or decided on the prior appeal. Instead of being authority for plaintiff in error this case is authority for respondent.

Neither is the case of Chaffin v. Taylor, 116 U. S. 567, authority here. In that case the Court held:

> "The rejoinder, which the Circuit Court permitted the defendant to file, tendered no issue of fact, but one of law merely, and every question of

law in the case had been covered by the former judgment of this Court in this case."

The Court further said:

"The rejoinder allowed to be filed after the judgment of reversal therefore sought again to draw in question the very matter which had been already finally adjudicated by that Court in the same case. It did not deny the genuineness of the coupons nor the fact of tender and the question of law broadly decided on the demurrer to the replication necessarily involved every defense arising as a matter of law that could be made upon any existing acts of the general assembly of Virginia."

The Court further held that the statute sought to be plead at the second trial had also been passed upon by the Supreme Court of the United States and that it did not give the party any additional right. Clearly this case is not authority for appellant's contention here. That case cites and approves the case of Supervisors v. Kennicot, 94 U. S. 498, as the rule of decision as to the law of the case, prevailing in the decisions of the Supreme Court of the United States. This latter case holds that questions decided are no longer open on a second appeal. "Such subsequent appeal brings up for consideration only the proceedings of the Circuit Court after the mandate of this Court."

The case of Tyler v. Magwin, 17 Wall., l. c. 283, announces the same doctrine. This doctrine in no way conflicts with the contention of defendant in error in this case, and is clearly the same rule adopted by the Missouri Court.

Neither is the case of Pitkin v. Shacklett, 117 Mo. 547, in point. In that case the cause was reversed and remanded by the Court with directions to the Circuit Court to enter in favor of plaintiffs a certain judgment, and, of course, it was a final adjudication of all matters on the question, which either were raised or might have been raised. The only thing to be done by the trial court was to make a calculation of the penalties and interest required by the statute, and find the proportion thereof chargeable to the land in question. The trial court did this and refused to permit the defendant to raise any question as to the validity of the levy, for the reason that that question had been fully adjudicated and was res adjudicata. We find no fault with this decision. We do not contend that where a cause has been adjudicated in an appellate court and is reversed and remanded to a trial court, with directions to do a particular thing, that the trial court can do other than follow strictly the mandate of the appellate court.

The Connecticut decree was offered in evidence and received without objection, and the same was fully considered by the trial court and the Supreme Court

of Missouri, and full faith and credit was given to it. The action of the trial court in giving the peremptory instruction to find for the plaintiff, was with full compliance with that decree, for it was upon other matters after having given the Connecticut decree full faith and credit, that the trial court decided that under the pleadings and all the evidence the plaintiff must recover. This very question was decided by the Supreme Court of Missouri in the case of Young v. Hartford Life Insurance Company, 277 Mo. 694.

II.

The Connecticut decree in the Dresser case is set out in full in the record. The portion pertinent here will be found on page 22, wherein it was adjudged that "the company was entitled to hold the amount of one quarterly assessment for the settlement of death claims which might arise before the amount of the assessment could be realized". The Court did not undertake to determine and did not determine that each and every assessment made as to each individual policyholder up to that time were legal and valid. Such a decree was not only not rendered, but was not within the purview of the pleading or the evidence in that case. Neither did that Court in that case hold that the defendant company might include an illegal tax in any of its assessments. Such a question was not raised, considered or decided. If

such question had been decided by the Court, it would not have been within the purview of the pleading or the evidence, nor would the Court have had jurisdiction to render any such a decree in a class suit because it was not a matter in which all the policyholders were interested and a suit by one for the benefit of another who did not join in such suit would not have been bound thereby. Neither did this Court decide any such question either in the Ibs case (237 U. S. 662), or when this case was here before (245 U. S. 146). This Court, however, did decide in those cases that defendant had the right under that decree to retain the amount of one assessment with which to pay future death claims. That is all that it did decide.

III.

The dues under the policy were not payable until October, 1910, following the alleged forfeiture of the policy in March, 1910. When this case was before the Supreme Court of Missouri before on this question it was said (269 Mo. 40-41):

> "IV. The appellant in argument contends that the policy was properly forfeited for non-payment of ten cents, a balance which it claims to have been due on the following figures. It charged Mr. Barber one-fourth of his annual dues under the policy for expenses—$1.50. The Court in the Dresser decree had ordered that $40,046.36 ille-

gally withheld from the policyholders on account of excessive fees exacted for the care of the safety fund should be returned to them. On this account $1.40 was credited as the share running to this policy, leaving ten cents due in addition to the assessment for mortuary purposes. The policy, in this respect, runs as follows:

"'In consideration of * * * $3 per annum on each $1,000 of the indemnity herein provided for, expense dues, to be paid as hereinafter conditioned.'

"The policy is dated September 4, 1903. On the next page are the 'conditions', which, with respect to this payment, are as follows:

"'The member agrees to pay to said company, for expenses, dues of $3 per annum on each $1,000 indemnity on the first day of the month after date of issue hereof, and at every anniversary thereafter, so long as this certificate shall remain in force; or by pro rata installments of the same, in advance, for periods of less than a year.'

"We have searched this voluminous record carefully for any evidence of any other arrangement. This was by the terms of the policy due on October 1st of each year and we see nothing in the provisions we have quoted which gave the appellant the right at its own election, and without the consent of the policyholders, to make it otherwise payable. The forfeiture cannot stand on this ten cents."

Under the contract the defendant had no right to forfeit the policy for failure to pay dues before October, 1910.

IV.

Section 7068 of the Revised Statutes of Missouri, 1909, providing for damages and attorney's fees for vexatious refusal to pay the loss under a policy of insurance, in no way violates the Federal Constitution.

Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123;
Fidelity Mutual Life Assn. v. Mettler, 185 U. S. 308;
Iowa Life Ins. Co. v. Lewis, 187 U. S. 335;
Farmers, Etc., Ins. Co. v. Dobney, 189 U. S. 301;
Fraternal Mystic Circle v. Snyder, 227 U. S. 497;
Williamson v. Liverpool, Etc., Ins. Co., 141 Fed. 54;
Keller v. Home Life Ins. Co., 198 Mo. 440.

This question has been decided so often by this Court, under similar statutes, that plaintiff in error's contention is so conclusively established to be without merit that it does not even give color for a federal question.

The plaintiff in error does not contend that the statute itself makes the mere refusal to pay sufficient evidence of bad faith so as to justify the recovery of the penalties therein provided, but contends that the St. Louis Court of Appeals, in Stix v. Travelers Ins. Co., 175 Mo. App. 171, have so held. This is not true. But the St. Louis Court of Appeals is an appellate

court of limited jurisdiction, and is bound to follow the decisions of the Supreme Court of Missouri, and has no jurisdiction of constitutional questions.

The courts of Missouri under this statute, since the case of Brown v. Ry. Passenger Assurance Co., 45 Mo., l. c. 227, have held that "the whole question of vexatious refusal or delay is a matter of fact to be determined by the jury. They must make up their verdict on this issue by a general survey of all the facts and circumstances in the case; and if, upon a full consideration, they conclude that the refusal was unjustifiable and vexatious, the law authorizes them to assess the damages. The statute will not admit of the construction contended for by the counsel for the plaintiff in error, that before damages are allowed it must be explicitly proved by the plaintiff that the delay or refusal was vexatious."

Keller v. Home Life Ins. Co., 198 Mo., l. c. 460-461;
Stix v. Travelers Ins. Co., 175 Mo. App. 171.

Plaintiff in error contends that there was no evidence in this case tending to prove a vexatious refusal to pay on its part. But there was evidence from which the jury might infer a vexatious refusal to pay upon the consideration of all the facts and circumstances in evidence.

The defendant canceled the policy in question on

its books March 31, 1910, when it knew and now alleges in its answer and admits and contends that under the terms of the policy, it was in force June 1, 1910, nine days before assured's death. Defendant also sent assured a notice on March 10th, stating that unless the assessment was paid by March 20th the policy would be canceled. In this notice, it was stated that assured would be charged an extra 50 cents under the Massachusetts law (whatever it is), and also would be charged another 50 cents to have the policy "unconditionally reinstated", and that after March 20th, 1910, the defendant reserved the right to require "a medical examination as a condition of reinstatement" (Rec., pp. 160, 161).

All this in the face of defendant's contention at the second trial that the policy was in force up to June 1st, 1910, and in the face of the provision of the policy, upon which the defendant sought to sustain a forfeiture, at the second trial. These acts and demands were in violation of the terms of the policy and were unlawful, and we can see no excuse for them, and none is offered.

In addition, defendant attempted to collect from assured an unlawful and illegal and excessive assessment which charged him with taxes in advance, and which it was not shown were ever levied or assessed by the State of Missouri, and which, under the law of the State, it had no right to assess, and did not

"require" to be paid. It failed to take into consideration in making the assessment a dividend of $1.40 earned upon assured's money which had been set apart to him by defendant. It made a full assessment in spite of it, and in spite of the fact that it was indebted to him in an amount more than sufficient to pay his assessment which, in law, it was bound to apply towards its payment. It charged assured with $1.50 due, which were not due and payable until the following October, and refused to credit assured with his dividend, unless the excessive and illegal assessment and dues were paid. Defendant then refused to pay the loss upon the sole ground, as stated by it in its letter denying liability, for failure to pay mortality call No. 126. When drawn into court it has been amending its pleadings from time to time in an endeavor to avail itself of defenses evidently not thought of at first, and which, under the law, it is estopped to assert. Besides, on December 31st, 1909, the date the alleged assessment was made, defendant had extended the time of payment upon $185,000.00 in assessments, carrying $609,000.00 of insurance, and there is but one legitimate conclusion to be drawn from this, and that is that it wished to lapse Barber's and other policyholders out, in order to divide the million dollars held by it, among certain policyholders—not to the beneficiaries after their death, but while they were still in the flesh (see provisions of

policy, Rec., p. 422). It lapsed out policyholders all over this country about this time, as shown by the reports of the Appellate Courts, and we have no doubt of its purpose in this regard. Finally, defendant has knowingly made an illegal defense.

The defendant was not a trustee at all, but a business insurance corporation. Its duties under its contract were both adverse and antagonistic to the interests of the assured. The rules governing ordinary trustees cannot be applied to it in this case, but under all the authorities an ordinary trustee has no right to pay and enforce against his cestui que trust an unenforcible claim. The defendant, as a matter of law, did not exercise the degree of care usually exercised by an ordinary man in the management of his business affairs, and it cannot claim that it acted in good faith in exacting from its policyholders the 2 per cent tax in question. The plain words of the statute itself only permitted premiums to be assessed. It ought to have occurred to defendant that the word "premiums" did not mean assessments, for the defendant itself is highly technical in the use of all these terms. Besides, the defendant in this case did not show that the Superintendent of Insurance of the State of Missouri, ever at any time levied or assessed any such tax. All this, too, in the face of a decision of Supreme Court of Missouri, rendered in 1897, construing this very statute, in which the defendant's counsel partici-

pated, and of which it was bound to take notice, and of which it had actual knowledge, in which the Court held that the State had no right or authority to levy or assess any such tax. And this, also, in the face of another decision of that Court, rendered in June, 1906, holding the same thing. Surely it cannot help the situation for the defendant to contend, as it does, that it paid to the State Treasurer bills for taxes on its premiums, some of which were taxable, which included these assessments which were not taxable. If the defendant had been half as diligent in fighting an illegal and unjust tax, which it did not show was ever assessed against it, as it has been in trying to defeat the wife of one of its deceased policyholders, who, in order to hover under the protecting wing of a benevolent equitable rule, now claims as its cestui que trust, after he had paid his insurance for seventeen years, failed to pay one illegal assessment, the tax in question would never have been exacted from assured and this issue would never have arisen in this case.

But these are all questions of fact which have been decided by the trial court and the Supreme Court of Missouri. It is not within the jurisdiction of this Court to review the decision of a state court upon a question of fact.

Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92;
Keokuk, Etc., Bridge Co. v. Illinois, 175 U. S. 626;
Atchison, Etc., R. Co. v. Matthews, 174 U. S. 96;
Chicago, Etc., R. Co. v. Chicago, 166 U. S. 226;
Egan v. Hart, 165 U. S. 188;
Dower v. Richards, 151 U. S. 658.

We respectfully submit that the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

CHARLES E. MORROW,
Attorney for Defendant in Error.

ROBERT KELLEY,
Of Counsel.